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No. 92-1415

IN THE

Supreme Court of the United States

October Term, 1992

DAVID BAIRD, ROZELLE BOYD, WILLIAM D. CRAWFORD, GLENN HOWARD and PAUL JONES,
Petitioners,

vs.

CONSOLIDATED CITY OF INDIANAPOLIS, WILLIAM H. HUDNUT III, MAYOR OF THE CITY OF INDIANAPOLIS, THE CITY-COUNTY COUNCIL OF THE CONSOLIDATED CITY OF INDIANAPOLIS, PHILIP BORST, DAVID BROOKS, RICHARD F. CLARK, DWIGHT COTTINGHAM, BEULAH COUGHENOUR, CARLTON CURRY, WILLIAM A. DOWDEN, ALLEN L. DURNIL, KENNETH H. GIFFIN, GORDON G. GILMER, HAROLD HAWKINS, HOLLEY M. HOLMES, RAY IRVIN, DAVID F. McGRATH, BEVERLY MUKES-GAITHER, STUART RHODES, BETTY RUHMKORF, WILLIAM SCHNEIDER, JULIUS F. SHAW, BUERT SERVASS, JOHN SOLENBERG, STANLEY F. STRADER, STEPHEN R. WEST, SUSAN WILLIAMS, FAYE MOWERY, as Marion County Clerk, MARION COUNTY ELECTION BOARD, CHARLES APPELGATE, and JOHN SCHWARTZ,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY TO NEW QUESTIONS RAISED IN RESPONDENTS' BRIEF

Petitioners reply to the new questions raised in Respondents' Brief in opposition to the Petition for a Writ of Certiorari as follows:

I

PETITIONERS' ASSERTED ISSUES OF FACT

Respondents, in a footnote, raise a new question that Petitioners waived issues relating to the factual record considered by the District Court in coming to its ruling on Respondents' Motion for Summary Judgment. Res. B, at 4-5 fn 3. The issue of waiver was neither presented to, nor considered by, the Court of Appeals. The factual record which the Respondents claim the Petitioners "waived" is specifically referred to at page 7 of the Petitioners' Brief to the Seventh Circuit. The District Court considered the affidavits in support of the Motion for Preliminary Injunction, the testimony and exhibits presented by both the Petitioners and the Respondents at the hearing on the Motion for Preliminary Injunction and the materials submitted by the Respondents in support of their Motion for Summary Judgment and by the Petitioners in opposition to the Motion for Summary Judgment. *See* Pet. App. A12-A14; and A19-20.

II

AT-LARGE DISTRICTS ARE UNDER CERTAIN CONDITIONS, UNLAWFUL

The Respondents misstate the Petitioners' argument regarding the at-larges by setting up a strawman that the Petitioners claim at-larges are *per se* unlawful. Res. B, at 6. Petitioners have never contended that at-larges are always illegal. Petitioners have contended that when, as the Respondents concede, "there is evidence satisfying . . . the *Gingles* three preconditions . . . as well as several Senate Report factors," summary judgment is *not* proper. Res. B, at 9.

There is a difference being *per se* unlawful and being unlawful in a certain factual setting that may occur often. If African-Americans in Marion County only constituted a small percentage, *i.e.*, less than 5% of the population, or there were no Senate Report factors present, then there would be no claim that the at-larges in Marion County violated the Voting Rights Act. *Gingles* requires that the district which elects representatives, not the body being elected to, is to have had proportionality over a long period of time in order to avoid liability.

In an election to fill a multi-member office, a minority class must have the *opportunity* to secure a share of the representation for the office by electing its members. *Butts v. City of New York*, 779 F.2d 141, 149 (2nd Cir. 1985). The Voting Rights Act protects citizens, not areas of "geographical overlap." Res. B, at 18. As this Court stated, in an Equal Protection setting, "[L]egislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). There is no principled basis for the creation of a "geographical overlap" exception to the district specific requirements of *Gingles*. The "proportionality" defense also destroys

"influence district" claims because the *Baird* court's theory of "proportionality" provides no basis for recognizing a minority group's ability to influence the election of representatives preferred by that minority group because it cannot be measured by their numbers alone. A Section 2 challenge may be based solely upon the theory that an election practice or procedure dilutes the ability of a minority group to *influence* the results of an election. The lower courts' manner of calculation of "proportional representation fails to take white crossover" voting into account which might enable a larger number of black-preferred candidates to be elected both from the single-member and at-large districts. *McNeil v. Springfield Park Board*, 851 F.2d 937 (7th Cir. 1988), *cert. den.* 490 U.S. 1031; *Chisom v. Roemer*, _____ U.S. _____, 111 S. Ct. 2354 (1991). *See Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991); *Growe v. Emison*, _____ U.S. _____, 113 S. Ct. 1075 (1993) and *Voinovich v. Quilter*, _____ U.S. _____, 113 S. Ct. 1149 (1993).

This doctrinal blindness is inherent in a theory that does not test each electoral device separately to determine its discriminatory effect. The Respondents have essentially conceded that there is not equal opportunity for African-American-supported candidates to be elected to an at-large seat, but urge that this "lack of equal opportunity" is "made up for" by having districts which do not discriminate because the districts now, for the first time in history, create slightly more than equal opportunity to elect from districts. The Respondents fail to address the rights of African-Americans who happen to live outside the seven [7] districts but who live in a district created out of the break up of the at-larges. In other words, under the Respondents' theory of "geographical overlap" only if the districts violate the Voting Rights Act will the at-larges violate the Voting Rights Act.

CONCLUSION

For these various reasons, and the reasons stated in the Brief in support of the petition for certiorari, the petition should be granted, a full briefing of the issues ordered, the opinion of the Circuit Court reversed and for all other proper relief.

Respectfully submitted,

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APPENDIX

RULE 15.1 MISSTATEMENT

As required by Rule 15.1 Rules of the Supreme Court of the United States, Petitioners hereby respond to those "perceived misstatements of fact or law" asserted by Respondents.

1. Respondents, at Res. B. 11, fn 8, incorrectly assert that "historical proportional representation did exist under the Council Plans predecessor, . . ., in that the 1987 councilmanic elections produced seven African-American members of the Council." As pointed out in *Nash v. Blount*, 797 F. Supp 1488 (W.D. Mo. 1992) *aff'd* as *African-American Voting Rights Legal Defense Fund, Inc. v. Blunt*, No. 92-1249, 61 U.S.L.W. 3678 (U.S. April 5, 1993) "[I]nasmuch as the Act protects voters [as opposed to candidates], the appropriate inquiry [to determine historical proportionality] would seem to be an analysis of the success of minority preferred candidates." *Nash* held that when "[b]oth Jackson County and St. Louis City have a ten year history of proportional representation . . . *and* the Commission's plan is likely to continue this trend for the next ten years" then and only then could it find historical proportional representation. At 1506.

Three (3) of these seven (7) were *not* candidates of choice of minority voters.

RESPONSE TO ASSERTED RULE 15.1 MISSTATEMENTS

Petitioners hereby respond to those "perceived misstatements of fact or law" asserted by Respondents at Res. B, at 1A-4A.

The claimed "misstatements of fact or law" alleged by the Respondents fall into four [4] categories:

1. *Correct statements of errors in the Petitioners' Brief:*

Misstatements: #3, #8, and #14—

Misstatement #3. The Petitioners originally intended to attach the affidavit of Respondent Beurtt Servaas, submitted by Respondents in support of their Motion for Summary Judgment as part of Petitioners' appendix which contained this statement. In the interests of brevity the affidavit was not attached and through Petitioners' counsel's oversight the reference to the affidavit was not removed. The page containing the statement was page 42 of the appendix to the Petitioners' Brief to the Seventh Circuit and is attached as Reply Brief A1.

Misstatement #8: Petitioners' counsel apologizes for his error in unfortunately leaving quotation marks in paragraph #13 on page 13. The paragraph should have appeared as follows.

> 13. The District Court "could almost take judicial notice of such [racial] discrimination." (A 42).

Misstatement #14: The Petitioners' counsel apologizes for the erroneous misattribution of Justice Brennan's words to Justice O'Connor.

2. *Erroneous allegations of "misstatements":*

Misstatements #4, #9, and #11—

Contrary to Respondents' claim of misstatement #4, the Trial Court explicitly incorporated its "April 25th entry" into its ruling on the Motion for Summary Judgment. Pet. App. at A12; A19-20.

Respondents claim in misstatement #9 demonstrates a failure to grasp the difference between "*how*" people vote the way they do i.e. they vote for "Democratic" or "Republican" candidates and "*why*" people vote the way they do i.e. they vote "Democratic" because of "thus and such" or they vote "Republican" because of "thus and such" or they vote "Independent" because of "thus and such." Actual election results only prove "*how*" people vote not "*why*" people voted the way they did.

The chart complained of as misstatement #11 by Respondents is merely a graphic presentation of witness Henderson's evidence given at the hearing on the Preliminary Injunction, pages 45-50, attached as Reply Brief A6-A10, which was referred to by the District Court, at Pet. App. at A31-33, and which formed part of the record before the Seventh Circuit.

3. *Mere dislike of the Petitioners' characterizations:*

Misstatements #1, #2, #4, #5, #6, #12, and #13—

The Respondents' assertions of misstatements in #1, #2, #4, #5, #6, #12, and #13 merely reflect that Respondents' dislike in having the argument framed differently from the way they would frame it. The Petitioners made no misstatements and thus the Respondents' allegations do not merit a response.

4. *Mere carping:*

Misstatements #7, and #10—

The Respondents are merely carping in their allegations of misstatements #7, and #10 and no response is merited.

PAGE FROM AFFIDAVIT OF BUERTT SERVAAS

[5] 10. The four (4) at-large City-County Council districts were established in Unigov to ensure that the strong leadership and responsibility which was the heart of Unigov through its Mayor and Council would not be destroyed by a council of one party and a mayor of another. The Unigov proponents believed strongly that the party winning the mayoral election should normally be strengthened in the council by the margin of four (4) at-large councilmen who normally would be of the same party as the mayor. Democrats initially opposed this arrangement, but their opposition diminished when they realized that regardless of how the individual district boundaries were drawn, the demographic pattern was such that Democrat voters would be more concentrated in a limited number of central districts than Republicans. Thus, without the potential of winning one (1) or more of the four (4) at-large seats, a small winning margin of Democratic votes county wide would be too heavily concentrated to secure a majority of Democrats in the Council. In substance, the four at-large districts were provided in Unigov to reduce the possibilities of the deadening effect of political gridlock between the Mayor and the Council and to avoid the fractioning of authority as had occurred in pre-Unigov governance.

* * * * *

EXCERPT OF TRIAL TESTIMONY OF GORDON H. HENDERSON

[44] Henderson—Direct

* * *

BY MR. LAUDIG:

Q. And do you have an opinion as to whether the 1982 plan [45] constituted a racial gerrymander? A. It looked to me like one, indeed. Because it was guilty of packing and cracking.

Q. Have you had a chance to examine the 1971 city-county council district?

And I am handing you Plaintiffs' Exhibit K, consisting of two pages, one page of which is the '71 plan, and the second page is the plan adopted in 1974 for use in 1975 and 1979. A. I have looked at these.

THE COURT: Are these in evidence pursuant to the stipulation?

MR. LAUDIG: They are authentic. I would offer them at this moment.

THE COURT: Any objection?

MR. PONADER: Your Honor, at this time we are going to interpose an objection of relevancy to this general line of questions with respect to councilmanic plans which are not before the court today. We went through the 1982 plan, which is barely relevant. It was one of the thoughts, I think, of all of the parties that we were not going to litigate a plan if we're going to have a new plan, that would be the one which would be in effect. Now, having done that, it's in the record, we are now apparently going back to 1971 and apparently earlier. I object on the ground this is simply not relevant to these proceedings.

[46] THE COURT: What's the purpose of the offer?

MR. LAUDIG: Your Honor, under the pertinent standard in Jingles, and even according to the defendants' brief in opposition, the totality of the circumstances is relevant here. One of those circumstances is the consistent and persistent historical discrimination against the minority community in Indianapolis in the drawing of electoral districts related to the council.

Our evidence will show that, in Dr. Henderson's opinion, in 1971, the plan was a racial gerrymander which resulted in two fewer districts that contained minority majority population.

The plan was then changed in 1974 for use in '75 and '79, and his testimony will be that the minority community was continued to be discriminated against in the drawing of district boundaries, with the result that in each of those elections there were two fewer districts than under a fair and nondiscriminatory plan could have been drawn, where the candidate of choice of the minority community would have been elected from the district.

His testimony with regard to 1982 is already of record.

THE COURT: Are you going back any further than '71?

MR. LAUDIG: Your Honor, 1970 is a watershed year. We will not be going back before then except for the limited purpose of showing that at-larges have always been used in municipal government. And that's cited I think in their brief and in [47] our brief.

We're not going to submit opinions as to whether or not there's racially polarized voting—

THE COURT: All right.

MR. LAUDIG: —or how many.

THE COURT: The objection's overruled.

BY MR. LAUDIG:

Q. And so, Dr. Henderson, do you have an opinion as to whether the 1971 map had a racially discriminatory effect on the minority community in Indianapolis? A. I do.

Q. What is that opinion? A. I believe it did have a racially discriminatory result.

Q. What was that result? A. The result was that, though the people had a black population concentration of a hundred and twelve thousand people to deal with, the equivalent of seven seats, they drew four black majority districts. I think without too much difficulty they could easily have drawn six.

Q. And have you had a chance to look at the districting plan adopted in 1974 for use in the 1975 and '79 elections? A. Yes.

Q. And do you have an opinion as to whether or not those two—that plan constituted a racial gerrymander? A. The same opinion holds, because the black population con-[48] centration increased every year, in every census beginning in 1960, and yet only four districts were created once again.

Q. Is it your opinion that the use of the at-large in the 1971, 1975, and 1979 elections had the same effect that it had in the 1983 and the 1987 elections with regard to whether the minority community was deprived of a seat that it could have otherwise elected to? A. I do.

Q. And what is that opinion? A. I believe it was so deprived because of the existence of the substantial black population concentration and the demonstrated existence in the elections I've looked at of racially polarized voting.

Q. Do you have an opinion as to whether at-large elections, both city council district or multimember districts, weigh heavily against inner city racial minorities, based upon your observations and measurements related to Marion County? A. As related to Marion County, yes, I believe they do.

Q. And how is that? A. Well, at-large elections are not necessarily racially discriminatory; the circumstances have to be right. The circumstances are right in Marion County, because we do have demonstrated racially polarized voting, we do have a black—huge black population concentration, and we do have cohesive voting on the part of blacks, and finally, we have very cohe-[49] sive polarized voting on the part of whites as well. Some whites.

Q. Do you have an opinion as to whether the at-large system in Marion County with regard to the council always gives an advantage to the majority over the minority? A. Yes. At-large elections always favor the majority.

Q. And does the use of the at-large seats on the council result in the majority electing all of the candidates of its choice? A. That has been true in all of the elections that I have looked at.

Q. Has there ever been a candidate of choice of the African-American community elected at large to the council? A. Not that I have seen.

Q. Do you have an opinion as to whether the at-large system with regard to the council has meant that candidates who happened to be minority are carried into office by the discriminatory effect of the at-larges themselves? A. Yes.

Q. What is that opinion? A. That has happened.

Q. Are the black candidates who were elected candidates of choice of the black community? A. Not always. The elections indicate for example that Beverly Mukes-Gaither is decidedly not the candidate of choice [50] of black voters. She is the candidate of choice of white voters, and she has been elected by white votes to the council. From an at-large seat.

Q. You said, "not always." Isn't it true that there is no instance with regard to the at-larges where a minority candidate who was elected was the candidate of choice of the minority population? A. That's true.

Q. With regard to the 1971 election, would you agree with the following statement, with regard to all municipal elections in Marion County that you have examined?

> "But for the at-large election to the council, Marion County blacks would be able to elect at least one more candidate of their choice to the council."

A. I agree with that statement.

* * * * *